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HOUSE BILL 277

46TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2003

INTRODUCED BY

Gail C. Beam

FOR THE TOBACCO SETTLEMENT REVENUE OVERSIGHT COMMITTEE

AN ACT

RELATING TO PUBLIC HEALTH; ENACTING THE TOBACCO RETAIL SALES ACT; REPEALING THE TOBACCO PRODUCTS ACT; IMPOSING LICENSING REQUIREMENTS; PROVIDING PENALTIES; AMENDING A SECTION OF THE CHILDREN'S CODE; MAKING AN APPROPRIATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. [NEW MATERIAL] SHORT TITLE. -- Sections 1 through 13 of this act may be cited as the "Tobacco Retail Sales Act".

Section 2. [NEW MATERIAL] DEFINITIONS. -- As used in the Tobacco Retail Sales Act:

- A. "department" means the department of health;
- B. "license" means a license issued by the secretary for the retail sale of tobacco products;
- C. "licensee" means a person that is issued a

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1 license for the retail sale of tobacco products;

2 D. "minor" means an individual who is less than
3 eighteen years of age;

4 E. "place of business" means a location where
5 tobacco products are sold, including a location where tobacco
6 products are sold by vending machine;

7 F. "secretary" means the secretary of health or the
8 secretary's designee; and

9 G. "tobacco product" means a substance that
10 contains tobacco, including cigarettes, cigars, pipe tobacco,
11 snuff, smoking tobacco or smokeless tobacco.

12 Section 3. [NEW MATERIAL] SECRETARY--DUTIES. -- The
13 secretary shall implement and enforce the provisions of the
14 Tobacco Retail Sales Act and shall:

15 A. issue licenses for the retail sale of tobacco
16 products;

17 B. provide licensees with signs that meet the
18 requirements specified in Section 5 of the Tobacco Retail Sales
19 Act;

20 C. investigate, concurrently with local and state
21 officials, violations of the Tobacco Retail Sales Act;

22 D. impose civil fines pursuant to the Tobacco
23 Retail Sales Act;

24 E. bring license suspension, revocation and
25 nonrenewal actions under the Tobacco Retail Sales Act; and

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1 F. take other actions as necessary and appropriate
2 to administer and enforce the provisions of the Tobacco Retail
3 Sales Act.

4 Section 4. [NEW MATERIAL] LICENSES. --

5 A. A license for the retail sale of tobacco
6 products shall be issued to a person for a specific place of
7 business and shall be valid for a period not to exceed six
8 years. A license is not assignable and is valid only for:

- 9 (1) the person in whose name it is issued; and
 - 10 (2) the specific place of business designated
- 11 on the license.

12 B. There is no fee for a license. A license shall
13 be available from the department upon request, if the secretary
14 finds that the person requesting the license has not previously
15 violated provisions of the Tobacco Retail Sales Act or any
16 other law relating to cigarettes and tobacco products. The
17 secretary may impose reasonable terms and conditions on the
18 license.

19 Section 5. [NEW MATERIAL] SIGNS CONCERNING MINORS. -- The
20 department shall provide to each licensee, free of charge, the
21 following two signs:

22 A. a sign consisting of red letters at least one
23 inch high on a white background stating: "IT IS A VIOLATION OF
24 THE LAW FOR CIGARETTES OR OTHER TOBACCO PRODUCTS TO BE SOLD OR
25 DISTRIBUTED TO ANY PERSON UNDER THE AGE OF 18.", and a

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1 depiction, at least two inches high, of a pack of cigarettes
2 and a can of smokeless tobacco surrounded by a red circle and
3 defaced by a red diagonal diameter line inside the surrounding
4 circle; and

5 B. a sign consisting of red letters at least one
6 inch high on a white background stating: "IT IS A VIOLATION OF
7 THE LAW FOR A PERSON UNDER THE AGE OF 18 TO PRESENT ANY FALSE
8 EVIDENCE OF AGE OR IDENTITY FOR THE PURPOSE OF OBTAINING
9 TOBACCO PRODUCTS. "

10 Section 6. [NEW MATERIAL] DISPLAY OF LICENSE AND SIGNS. --

11 A licensee shall publicly display in at least one conspicuous
12 location at the place of business designated on the license:

13 A. the license or a copy of the license that
14 authorizes the sale of tobacco products or that authorizes a
15 tobacco vending machine; and

16 B. two signs that meet the requirements of Section
17 5 of the Tobacco Retail Sales Act.

18 Section 7. [NEW MATERIAL] RESTRICTIONS ON SALES OF
19 TOBACCO PRODUCTS--VENDING MACHINES. --

20 A. A licensee or a licensee's agent or employee
21 shall not sell or distribute a tobacco product:

22 (1) to a minor;

23 (2) in any form other than an original
24 factory-sealed package; or

25 (3) at any place other than the specific place

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1 of business for which a license has been issued.

2 B. Except as provided in Subsections C and D of
3 this section, a licensee or a licensee's agent or employee
4 shall not:

5 (1) sell tobacco products by any means other
6 than a direct, face-to-face exchange with the purchaser; and

7 (2) use a self-service display for tobacco
8 products. As used in this paragraph, "self-service display"
9 means a display to which the public has access without the
10 assistance of the seller.

11 C. Tobacco products may be sold by vending machines
12 in the following locations only:

13 (1) in controlled locations not open to the
14 public; or

15 (2) in age-controlled locations where minors
16 are not permitted unless accompanied by a parent or guardian.

17 D. The provisions of Subsections B and C of this
18 section do not apply to written, telephonic or electronic
19 sales.

20 Section 8. [NEW MATERIAL] PROHIBITION ON UNLICENSED SALE
21 OR DISTRIBUTION OF TOBACCO PRODUCTS. -- Only a licensee or a
22 licensee's employee or agent shall sell or distribute a tobacco
23 product to a consumer, but an individual may provide a free
24 sample of a tobacco product to a family member or to an
25 acquaintance who is not a minor.

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1 Section 9. ~~[NEW MATERIAL]~~ EVIDENCE OF AGE AND IDENTITY
2 REQUIRED. --

3 A. Evidence of the age and identity of a person
4 seeking to purchase a tobacco product shall be shown by valid
5 identification issued by a federal, state, county or ~~municipal~~
6 government and containing a photograph of that person.

7 B. A licensee or a licensee's agent or employee
8 shall refuse to sell tobacco products to a person who
9 reasonably appears to be less than twenty-seven years of age
10 and who is unable to produce valid identification or proper
11 documentary evidence establishing that the person is not a
12 minor.

13 Section 10. ~~[NEW MATERIAL]~~ FALSE EVIDENCE OF AGE--
14 PENALTIES. --

15 A. A minor shall not present false evidence of age
16 or identity for the purpose of procuring or attempting to
17 procure tobacco products.

18 B. A violation of Subsection A of this section is a
19 petty misdemeanor and the minor shall be punished by one of the
20 following:

- 21 (1) a fine not to exceed one hundred dollars
22 (\$100);
- 23 (2) performing twenty-four hours of ~~community~~
24 service; or
- 25 (3) taking and completing a smoking cessation

1 class.

2 C. A minor who violates Subsection A of this
3 section for a second or subsequent time shall be punished by a
4 combination of at least two of the penalty options set forth in
5 Subsection B of this section.

6 Section 11. [NEW MATERIAL] VIOLATIONS--PENALTIES--
7 SUSPENSION, REVOCATION AND NONRENEWAL OF LICENSES. --

8 A. A licensee that violates a requirement of
9 Section 6 of the Tobacco Retail Sales Act shall be subject to a
10 civil fine of not more than one hundred dollars (\$100) for a
11 first violation. A licensee shall be subject to a civil fine
12 of not more than five hundred dollars (\$500) for each
13 subsequent violation.

14 B. A licensee or a licensee's agent or employee who
15 violates a provision of Section 7 of the Tobacco Retail Sales
16 Act shall be subject to a civil fine of:

17 (1) one hundred dollars (\$100) for a first
18 violation;

19 (2) two hundred fifty dollars (\$250) for a
20 second violation within a two-year period;

21 (3) five hundred dollars (\$500) for a third
22 violation within a two-year period;

23 (4) one thousand dollars (\$1,000) for a fourth
24 violation within a two-year period; and

25 (5) five thousand dollars (\$5,000) for a fifth

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1 or subsequent violation within a two-year period.

2 C. In addition to the civil fines provided in
3 Subsection B of this section, if a licensee or a licensee's
4 agent or employee violates a provision of Section 7 of the
5 Tobacco Retail Sales Act, the license for the place of
6 business:

7 (1) may be suspended for a period not to
8 exceed twenty-four hours upon a first violation;

9 (2) may be suspended for a period not to
10 exceed two consecutive days upon a second violation within a
11 two-year period;

12 (3) may be suspended for a period not to
13 exceed one week upon a third violation within a two-year
14 period;

15 (4) shall be suspended for a period not to
16 exceed one month upon a fourth violation within a two-year
17 period; and

18 (5) shall be revoked, and shall not be renewed
19 for five years, upon a fifth violation within a two-year
20 period.

21 D. A hearing officer may consider the following as
22 mitigating factors prior to imposing a license suspension or
23 revocation:

24 (1) the licensee informed each of its
25 employees and agents verbally and in writing of the applicable

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1 laws regarding sales of tobacco products to a minor;

2 (2) the licensee engaged in a consistent
3 practice of requiring employees and agents to refuse to sell
4 tobacco products to a person who appeared to be less than
5 twenty-seven years of age and was unable to produce valid
6 identification; or

7 (3) the licensee established and imposed
8 sanctions, in a consistent manner, against employees or agents
9 who did not comply with the requirements of Section 7 of the
10 Tobacco Retail Sales Act.

11 E. A person who violates Section 8 of the Tobacco
12 Retail Sales Act shall be subject to a civil fine of one
13 thousand dollars (\$1,000). A person who violates that section
14 for a second or subsequent time shall be subject to a civil
15 fine of five thousand dollars (\$5,000).

16 Section 12. [NEW MATERIAL] ENFORCEMENT--HEARINGS--
17 LIMITATIONS--COSTS--APPEAL. --

18 A. A citation shall be issued or a written notice
19 shall be mailed to a person who is subject to a civil fine
20 under Subsection A, B or E of Section 11 of the Tobacco Retail
21 Sales Act. The citation or written notice shall set forth the
22 factual basis for the violation and the applicable fine and
23 shall notify the person of the person's right to a hearing. If
24 the person does not file a written request for a hearing with
25 the secretary within thirty days, the fine imposed shall be

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1 final and shall not be subject to review.

2 B. If the secretary determines to suspend or revoke
3 a license pursuant to Subsection C of Section 11 of the Tobacco
4 Retail Sales Act, the secretary shall provide written notice to
5 the licensee of the preliminary determination to suspend or
6 revoke the license. The written notice shall state the grounds
7 for the contemplated action and notify the licensee of the
8 licensee's right to a hearing. If the licensee does not file a
9 written request for a hearing with the secretary within thirty
10 days, the suspension or revocation of the license as stated in
11 the written notice shall become final and shall not be subject
12 to review.

13 C. Hearings shall be conducted by a hearing officer
14 designated by the secretary. Hearings shall be open to the
15 public and may be held telephonically at the discretion of the
16 hearing officer. A complete record shall be made of the entire
17 proceeding and of all evidence presented at the hearing.

18 D. The hearing officer shall have the power to
19 administer oaths, issue subpoenas and compel the attendance of
20 witnesses and the production of evidence in a hearing held
21 under the provisions of the Tobacco Retail Sales Act.

22 E. The hearing officer's final decision shall be in
23 writing and may be appealed to the district court pursuant to
24 the provisions of Section 39-3-1.1 NMSA 1978.

25 F. If the person charged with a violation does not

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1 prevail at the hearing, the person shall bear the costs of the
2 hearing at the discretion of the hearing officer.

3 G. No citation or written notice of a violation may
4 be issued more than one year after discovery of the conduct
5 that forms the basis for the violation.

6 Section 13. [NEW MATERIAL] NO PREEMPTION. -- Nothing
7 contained in the Tobacco Retail Sales Act restricts or limits
8 the power of a local government to adopt and enforce ordinances
9 that comply with the minimum standards set forth in the Tobacco
10 Retail Sales Act.

11 Section 14. Section 32A-2-3 NMSA 1978 (being Laws 1993,
12 Chapter 77, Section 32, as amended) is amended to read:

13 "32A-2-3. DEFINITIONS. -- As used in the Delinquency Act:

14 A. "delinquent act" means an act committed by a
15 child that would be designated as a crime under the law if
16 committed by an adult, including the following offenses:

17 (1) pursuant to municipal traffic codes or the
18 Motor Vehicle Code:

19 (a) any driving while under the
20 influence of intoxicating liquor or drugs;

21 (b) any failure to stop in the event of
22 an accident causing death, personal injury or damage to
23 property;

24 (c) any unlawful taking of a vehicle or
25 motor vehicle;

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1 (d) any receiving or transferring of a
2 stolen vehicle or motor vehicle;

3 (e) any homicide by vehicle;

4 (f) any injuring or tampering with a
5 vehicle;

6 (g) any altering or changing of an
7 engine number or other vehicle identification numbers;

8 (h) any altering or forging of a
9 driver's license or permit or any making of a fictitious
10 license or permit;

11 (i) reckless driving;

12 (j) driving with a suspended or revoked
13 license; or

14 (k) any offense punishable as a felony;

15 (2) buying, attempting to buy, receiving,
16 possessing or being served any alcoholic liquor or being
17 present in a licensed liquor establishment, other than a
18 restaurant or a licensed retail liquor establishment, except in
19 the presence of the child's parent, guardian, custodian or
20 adult spouse. As used in this paragraph, "restaurant" means
21 any establishment where meals are prepared and served primarily
22 for on-premises consumption and that has a dining room, a
23 kitchen and the employees necessary for preparing, cooking and
24 serving meals. "Restaurant" does not include [establishments]
25 an establishment, as defined in regulations promulgated by the

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1 director of the special investigations division of the
2 department of public safety, that [~~serve~~] serves only
3 hamburgers, sandwiches, salads and other fast foods;

4 (3) any felony violation of the provisions of
5 Sections 17-1-1 through 17-5-9 NMSA 1978 or any regulations
6 adopted by the state game commission that relate to the time,
7 extent, means or manner that game animals, birds or fish may be
8 hunted, taken, captured, killed, possessed, sold, purchased or
9 shipped and for which a fine may be imposed or a civil damage
10 awarded;

11 (4) any violation of Section 30-29-2 NMSA
12 1978, regarding the illegal use of a glue, aerosol spray
13 product or other chemical substance;

14 (5) any violation of the Controlled Substances
15 Act;

16 (6) escape from the custody of a law
17 enforcement officer or a juvenile probation or parole officer
18 or from any placement made by the department by a child who has
19 been adjudicated a delinquent child; [~~or~~]

20 (7) any violation of Section 30-15-1.1 NMSA
21 1978 regarding unauthorized graffiti on personal or real
22 property; or

23 (8) presenting false evidence of age or
24 identity for the purpose of procuring or attempting to procure
25 tobacco products in violation of Subsection A of Section 10 of

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1 the Tobacco Retail Sales Act;

2 B. "delinquent child" means a child who has
3 committed a delinquent act;

4 C. "delinquent offender" means a delinquent child
5 who is subject to juvenile sanctions only and who is not a
6 youthful offender or a serious youthful offender;

7 D. "detention facility" means a place where a child
8 may be detained under the Children's Code pending court hearing
9 and does not include a facility for the care and rehabilitation
10 of an adjudicated delinquent child;

11 E. "felony" means an act that would be a felony if
12 committed by an adult;

13 F. "misdemeanor" means an act that would be a
14 misdemeanor or petty misdemeanor if committed by an adult;

15 G. "restitution" means financial reimbursement by
16 the child to the victim or community service imposed by the
17 court and is limited to easily ascertainable damages for injury
18 to or loss of property, actual expenses incurred for medical,
19 psychiatric and psychological treatment for injury to a person
20 and lost wages resulting from physical injury, which are a
21 direct and proximate result of a delinquent act. "Restitution"
22 does not include reimbursement for damages for mental anguish,
23 pain and suffering or other intangible losses. As used in this
24 subsection, "victim" means any person who is injured or suffers
25 damage of any kind by an act that is the subject of a complaint

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1 or referral to law enforcement officers or juvenile probation
2 authorities. Nothing contained in this definition limits or
3 replaces the provisions of Subsections A and B of Section
4 32A-2-27 NMSA 1978;

5 H. "serious youthful offender" means an individual
6 fifteen to eighteen years of age who is charged with and
7 indicted or bound over for trial for first degree murder. A
8 "serious youthful offender" is not a delinquent child as
9 defined pursuant to the provisions of this section; and

10 I. "youthful offender" means a delinquent child
11 subject to adult or juvenile sanctions who is:

12 (1) fourteen to eighteen years of age at the
13 time of the offense and who is adjudicated for at least one of
14 the following offenses:

15 (a) second degree murder, as provided in
16 Section 30-2-1 NMSA 1978;

17 (b) assault with intent to commit a
18 violent felony, as provided in Section 30-3-3 NMSA 1978;

19 (c) kidnapping, as provided in Section
20 30-4-1 NMSA 1978;

21 (d) aggravated battery, as provided in
22 Subsection C of Section 30-3-5 NMSA 1978;

23 (e) aggravated battery upon a peace
24 officer, as provided in Subsection C of Section 30-22-25 NMSA
25 1978;

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1 (f) shooting at a dwelling or occupied
2 building or shooting at or from a motor vehicle, as provided in
3 Section 30-3-8 NMSA 1978;

4 (g) dangerous use of explosives, as
5 provided in Section 30-7-5 NMSA 1978;

6 (h) criminal sexual penetration, as
7 provided in Section 30-9-11 NMSA 1978;

8 (i) robbery, as provided in Section
9 30-16-2 NMSA 1978;

10 (j) aggravated burglary, as provided in
11 Section 30-16-4 NMSA 1978;

12 (k) aggravated arson, as provided in
13 Section 30-17-6 NMSA 1978; or

14 (l) abuse of a child that results in
15 great bodily harm or death to the child, as provided in Section
16 30-6-1 NMSA 1978;

17 (2) fourteen to eighteen years of age at the
18 time of the offense and adjudicated for any felony offense and
19 who has had three prior, separate felony adjudications within a
20 three-year time period immediately preceding the instant
21 offense. The felony adjudications relied upon as prior
22 adjudications shall not have arisen out of the same transaction
23 or occurrence or series of events related in time and location.
24 Successful completion of consent decrees are not considered a
25 prior adjudication for the purposes of this paragraph; or

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1 (3) fourteen years of age and adjudicated for
2 first degree murder, as provided in Section 30-2-1 NMSA 1978. "

3 Section 15. APPROPRIATION. --One hundred fifty thousand
4 dollars (\$150,000) is appropriated from the general fund to the
5 department of health for expenditure in fiscal year 2004 to
6 contract for or hire a hearing officer as needed and three
7 investigators, and to pay for other expenses of the department
8 in carrying out the Tobacco Retail Sales Act. Any unexpended
9 or unencumbered balance remaining at the end of fiscal year
10 2004 shall revert to the general fund.

11 Section 16. REPEAL. --Sections 30-49-1 through 30-49-12
12 NMSA 1978 (being Laws 1993, Chapter 244, Sections 1 through 12)
13 are repealed.

14 Section 17. EFFECTIVE DATE. --The effective date of the
15 provisions of this act is July 1, 2003.

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